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AMAL BAKTI SDN BHD & ORS

v.

MILAN AUTO (M) SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER JC
[COMMERCIAL TRIAL NO: D8-22-1819-2005]
12 JUNE 2009

C ***CONTRACT:*** *Misrepresentation - Negligent misrepresentation - Sale and purchase of shares - Shares rendered worthless due to failed listing exercise - Whether plaintiffs induced to purchase shares on negligent misrepresentations by defendant - Whether plaintiffs to have taken prudent measures to safeguard interests*

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The 2nd and 3rd plaintiffs purchased more than 5 million shares of Energro Berhad ('Energro'), the listing vehicle company of a restructuring scheme, at RM1 each from the 1st defendant. Another company known as KLCS Asset Management Sdn Bhd ('KLCS') purchased 1 million Energro shares at RM1 each from the 1st defendant. The 2nd defendant was the Merchant Bank and adviser of the restructuring scheme. The Securities Commission ('SC') revoked the listing exercise of Energro after discovering that there was no new core business as represented in the proposal of the restructuring scheme and reprimanded the 2nd defendant. The 2nd defendant was said to have made public statements of the injection of the new core business based on the information of one Kenneth Chow of the 1st defendant. The plaintiffs now claimed that the 2nd defendant was negligent in making the said statements without proper investigation, and more importantly, knowing that the new core business was essential for the successful listing of Energro. They claimed that they relied on the said statements for the purchase of the Energro shares as a result of which they suffered losses and damage. They attempted to rely on the reprimand by the SC to find the 2nd defendant liable. KLCS, on the other hand, had assigned all its rights, claims, interests and chose in action to the 1st plaintiff for only RM1 after receiving information that the listing exercise had collapsed and that the shares had become worthless. Also, the SC had instituted a civil suit against the 1st defendant and Kenneth Chow, amongst others, wherein all contracts relating to the sale and purchase of Energro shares including the plaintiffs' contract for the purchase

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thereof, were declared *void ab initio*. It was further ordered that the 1st defendant and Kenneth Chow repay and restore the monies paid for the purchase of the Energro shares.

Held (dismissing the plaintiffs' claim):

(1) The court in the SC's civil suit had already declared the contract for the shares to be void and that too pursuant to s. 100(1)(hh) of the Securities Industries Act 1983. That put finality to further litigation and was a protection for the 2nd defendant as well as others who might be liable because of the chain of events that had taken place. The court also ordered that the plaintiffs were entitled to the return of the purchase price from the 1st defendant and Kenneth Chow. That being the case, the plaintiffs could not make further claims when they had been indemnified by the order of the court in the SC's civil suit. There could not be a double claim and a suit could not be initiated which could lead to unjust enrichment. It followed that the plaintiffs had no cause of action against the defendants on the ground that the contract was *void ab initio*. The plaintiffs' action ought to have been dismissed *in limine*. However, since the defendants did not take the objection at the earliest opportunity and the matter had been set for trial, the case should be dealt on merits. (paras 8 & 10)

(2) The 1st plaintiff's right, by way of deed of assignment, was void as there was no assignable cause of action from KLCS to the 1st plaintiff. The 1st plaintiff paid only RM1 with a view of obtaining a larger sum through litigation taking into consideration that it was not the original purchaser and suffered no loss whatsoever. The court will not entertain champerty agreement or its like on public policy grounds. On the facts, the action by the 1st plaintiff against the 2nd defendant was not maintainable (see s. 24 (e) Contracts Act 1950). (paras 11 & 12)

(3) There was a duty imposed on a plaintiff to take reasonable precautions to safeguard his own interest before complaining others were negligent. In the present case, the plaintiffs would not have suffered any monetary loss if they had paid the purchase money into a stakeholder account. The plaintiffs knew that there were risks involved in the restructuring exercise notwithstanding the number of regulatory safeguards

to protect the investing public. The evidence showed that the 2nd and 3rd plaintiffs had in fact placed the purchase price in a "special account" and specifically authorised monies to be released to the 1st defendant on their own volition despite the risks involved in the listing. The plaintiffs did not take any prudent measures to protect their investments. (para 13)

(4) Although the 2nd defendant was under a duty to take care, it had observed the general requisite standards. Its misfortune was due to Kenneth Chow who defeated the said listing process. In addition, the defendants' submission in respect of statutory breach, negligence, *etc*, had merits. (para 13)

[The getting-up fees shall not exceed RM100,000. If costs could not be agreed, the 2nd defendant was at liberty to tax the costs.]

Case(s) referred to:
Bhagwat Singh v. Debi Dayal Sahu [1908] 35 IA 48 ***(refd)***
Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Goculdas v. Lakshimidas [1879] 3 Borm 42 ***(refd)***
Hendasan and Others v. Merett Syndicates Ltd [1995] 2 AC 145 ***(refd)***
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 ***(refd)***
Jupiter Ltd (Trading As Conrad International Treasury Casino) v. Gan Kok Beng & Anor [2008] 7 CLJ 715 HC ***(refd)***
Mallesons Stephen Jacques v. Trenorth Ltd [1999] IVR ***(dist)***
Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia [2001] 1 CLJ 740 CA ***(refd)***
Payna Chettiar v. Low Meng Seng & Ors [1998] 2 SLR 289 ***(refd)***
Voon Jan Choo v. Lee Chie Siang & Anor [2007] 9 CLJ 242 HC ***(refd)***
Woods v. Duncan [1946] AC 4001 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24(e)
Securities Industries Act 1983, s. 100(1)(hh)

Other source(s) referred to:
Chitty on Contracts, 13th edn, vol 1, p 1120

For the plaintiffs - Abdul Rashid Ismail (M/s Eileen Othman with him); M/s Benjamin Dawson
For the defendants - Ariff Rozhan (SN Raj & Zainurazira with him); M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim against the 2nd defendant as purchasers of shares through private placement with the 1st defendant. The plaintiffs' action is based on breach of statutory duties, negligent misstatement etc.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

Brief Facts

[3] The 2nd and 3rd plaintiffs bought more than 5 million shares of one ringgit each of Energro, the listing vehicle in respect of a restructuring scheme from the 1st defendant by way of Private Placement. One company referred to as KLCS Asset Management Sdn Bhd (KLCS) purchased 1 million shares of one ringgit each from the 1st defendant. By a deed of assignment dated 29 December 2004 KLCS assigned all of its rights claims interest and chose in action, etc to the 1st plaintiff for one ringgit after having knowledge that the listing exercise has collapsed and the shares in practical terms have become worthless. The 2nd defendant was the Merchant Bank and adviser of the restructuring scheme. The restructuring scheme consisted of ten corporate exercises including the injection of one new core business, which will provide immediate and stable source of revenue, profit and cash flow etc; for Energro. On 2 August 2004, Securities Commission (SC) announced that the listing of Energro has been revoked after discovering that there was no new core business as represented in the proposal for the restructuring scheme and subsequently reprimanded the 2nd defendant. The 2nd defendant

A has made public statements by way of announcements, explanatory statements and/or prospectus to reflect the injection of the new core business based on the information of one Kenneth Chow the anchor men of the 1st defendant. The information of Kenneth Chow turned to be untrue. And the plaintiffs in essence complain
B that the 2nd defendant was negligent in making the statement without proper investigation and more importantly when knowing that the new core business is essential for successful listing of Energro shares. And they complain that they had relied on the 2nd defendant's various statements for the purchase of the shares.
C And in essence attempts to rely on the reprimand to find the 2nd defendant liable.

[4] It is also part of the pleaded case of the plaintiffs that SC had instituted a civil suit No. D4-21-51-2004 (Civil Suit) against
D Omega, 1st defendant and Kenneth Chow and obtained various orders including a declaration that all contracts relating to the sale and offer for sale of Energro shares (which include the plaintiffs' relevant agreement for the purchase of Energro shares) be set aside as *void ab initio* and that *inter alia* the 1st defendant,
E Kenneth Chow repay and restore the monies paid for such Energro shares. The plaintiffs have not received any money from these persons yet and in consequence are mounting a claim against the 2nd defendant.

F **[5]** The defendants in essence say that the cause of action relied on by the plaintiffs is wrong in law; and/or misconceived; and/or cannot be sustained by the facts and evidence. And assert that the plaintiffs and the 2nd defendant have no nexus and the plaintiffs purchased shares by Private Placement and they could
G have prudently protected their interest by paying the purchase price in stakeholders account for it to be released only upon the listing of Energro shares. And they have used reasonable skill and care to ensure that the information contained in the public announcements was timely, accurate, had sufficient disclosure of all
H material information and had no omission of material information, and for that purpose did the following:

(i) ensured that the company had appointed solicitors to undertake a Due Diligence exercise;

I (ii) prepared a Due Diligence Planning Memo;

(iii) implemented a formal Due Diligence Working Group which consisted of representatives from;

(a) Messrs. Syed Alwi , Ng & David Chong (formerly David Chong & Co) – solicitors for Due Diligence Exercise;

(b) Omega holdings Berhad – the company;

(c) The 1st defendant (including Kenneth Chow, the 1st defendant's representative);

(d) Milan Auto Corporation (M) Sdn Bhd;

(e) Micheal Ng & associates – the Reporting Accountant; and

(f) Ernst & Young – the Scheme Advisor to the company.

(iv) the 2nd defendant had made enquiries as were reasonable in the circumstances.

[6] It was the evidence of both the plaintiffs' as well as the defendants' witness in this case that Kenneth Chow was a cheat and had been convicted. If not for Kenneth's misstatement, the listing of Energro shares would have been successful.

Preliminaries

[7] Seven witnesses gave evidence for the plaintiffs and two for the defendants. I will say that nothing useful was established in the lengthy cross examination of various witnesses save to say that the parties were basically relying on the public announcements and/or statements and the agreed facts to establish liability or negate the same. However a number of technical issues have arisen in this case and at least some of them need to be addressed in this judgment.

Civil Suit

[8] The plaintiffs' pleading originates on the basis that they were affected because they purchased shares. However, the court in the said Civil Suit has already declared the said agreement to be void and that too pursuant to s. 100(1)(hh) of the Securities Industries Act 1983, and in my view it is meant to put a finality to further litigation and a protection for 2nd defendant as well as others who may be liable because of the chain of events that have taken place. And in addition, the court had ordered restitution or its like, for which the plaintiffs are entitled to the return of the purchase price from the 1st defendant, Kenneth Chow etc. That being the case the plaintiffs cannot rely on a void agreement

where the remedy has been provided for to make further claims when the plaintiffs pursuant to the said Civil Suit have been indemnified by the order of court though they may have not received the money from the relevant parties yet. In essence, there cannot be double claim and a suit cannot be initiated which in practical terms can lead to unjust enrichment. Support for the proposition can be found in a number of cases to name a few are as follows: (i) *Payna Chettiar v. Low Meng Seng & Ors* [1998] 2 SLR 289; (ii) *Jupiter Ltd (Trading As Conrad International Treasury Casino) v. Gan Kok Beng & Anor* [2008] 7 CLJ 715.

[9] The plaintiffs say that a cause of action in tort can survive independently from a cause of action in contract and rely on the House of Lords' decision in *Hendasan and Others v. Merett Syndicates Ltd* [1995] 2 AC 145 where Lord Goff opined that:

> the law of tort is the general law out of which the parties can, if they wish, contract, a tortuous duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract, an assumption of responsibility by a person rendering personal or quasi-profession services coupled with a concomitant reliance by the person for whom the services were rendered could give rise to a tortuous duty of care irrespective of whether there was a contractual relationship between the parties.

The plaintiffs' proposition is correct but does not apply to our case as there is a civil suit which has provided the remedy in full to the plaintiffs and the law does not permit double recovery. The plaintiffs also rely on the case of *Mallesons Stephen Jacques v. Trenorth Ltd* [1999] IVR. In this case, the Supreme Court of Victoria was deciding on the liability of a firm of solicitors, Mallesons Jaques, in work done for his client, Trenoth Ltd. The facts of the case involved the leasing and sale of a shop premises at Preston, Victoria. In this suit between Trenoth, as vendor, and the purchaser, the court of first instance declared that the contract was *void ab initio*. Trenoth then claimed for damages and indemnity against Mallesons. In that case, the Supreme Court held that the negligence of the firm of the solicitors was a necessary pre-condition to Trenoth's loss. The plaintiffs says the facts of the Mallesons case clearly show that even though the contract in question is declared *void ab initio*, the plaintiffs are not barred from bringing a claim for negligence against the second

defendant for losses suffered. Again, the above case can be distinguished as the civil suit has provided a remedy for the plaintiffs.

[10] I am of the view that based on the order of the civil suit and the remedy having been provided for to the plaintiffs the plaintiffs have no cause of action against the 2nd defendant *inter alia* on the rational grounds that the contract was *void ab initio* and there was nothing the plaintiffs could have relied on to purchase the said shares; more so when the court has provided them a relief. On this ground alone, the plaintiffs' action ought to have been dismissed *in limine*. However, since the defendants did not take the objection at the earliest opportunity and the matter has been set for trial, I took the safer approach to deal the case on merit.

Champerty Agreement

[11] The 2nd defendant complains that the 1st plaintiff's right by way of deed of assignment is void as there is no assignable cause of action from KLCS to the 1st plaintiff and has given number of grounds in the submission which I tend to agree with. It will be sufficient if I deal with the issue relating to champerty agreement. In this case the 1st plaintiff had paid RM1 ringgit only with a view of obtaining a larger sum through litigation taking into consideration the 1st plaintiff is not the original purchaser and has suffered no loss whatsoever. It is trite that court will not entertain champerty agreement or its like on public policy grounds etc. The learned authors of *Chitty on Contracts,* 13th edn, vol 1, p 1120 make the following observations:

> Champerty has been defined as "an aggravated form of maintenance: and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. For champerty there must not only be interference on the suit but there must be the added factor of a division of the spoils. There is an obvious relationship between maintenance and champerty, you cannot have the latter without the former but "there can still be champerty even if the maintenance is not unlawful". In *Giles v. Thompson*, Lord Mustill was of the opinion that champerty as it related to an agreement by a solicitor to accept payment of his fees measured as a proportion of the damages recovered by his client survived largely as a rule of professional conduct. While there undoubtedly have been significant changes in the rules relating to fee arrangements between solicitors and their clients

> which now permit arrangements which previously would have been champertous, it is suggested that it would be going too far to treat the rule as being merely one of professional conduct. It is no justification for a champertous agreement that the contracting parties are related by blood. The question arises whether the court can enjoin would suggest not. Where the plaintiff relies on a champertous assignment to sue, the action would be enjoined not, however, because of the champerty as such but because it is not possible to assign a cause of action.

Our Contracts Act is *pari materia* to the Indian Contracts Act and the Privy Council has held that an agreement champertous according to English law was not necessarily void in India, it must be against public policy to render it void (see *Bhagwat Singh v. Debi Dayal Sahu* [1908] 35 IA 48). The policy is regarded as part of the law of "justice equity and good conscience". In *Goculdas v. Lakshimidas* [1879] 3 Borm. 42, it was held in a suit brought by the assignee to have the compromise declared void on the ground of fraud that suit was not maintainable, as the assignment was effected with a view of litigation, and was therefore, champertous in nature.

[12] On the facts of the instant case I have no hesitation in holding the said action by the 1st plaintiff against the 2nd defendant as not maintainable (See s. 24(e) Contracts Act 1950).

[13] I have heard the evidence, read the documents, agreed facts, submission etc; of the parties in detail. I do not wish to discuss the various submissions which have been adequately dealt with by the respective counsels for which I am grateful. After careful thought to the submission I take the view the plaintiffs' claim must be dismissed. My reasons are as follows:

(a) In essence the plaintiffs say that the 2nd defendant had made several representations negligently and these representations induced them to purchase the shares of Energro and the representation were in fact untrue and false and the plaintiffs have by reason thereof suffered loss and damage. And rely on the following cases namely: (i) *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575; (ii) *Caparo Industries plc v. Dickman* [1990] 2 AC 605, [1990] 1 All ER 568 HL; and (iii) *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 CLJ 740 where the Court of Appeal made the following observations:

> In light of the position of the appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the appellant were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the respondent than that f a mere finder. They certainly owe a higher burden when supplying any information from the company to the respondent. They ought to ascertain and verify all information from the company to the respondent.

The proposition stated in *Malaysian International Merchant Bankers* is trite but cases also need to be decided on their own peculiar facts and other relevant principles of law. In our case it was clear that the plaintiffs and/or the original purchasers could have safe guarded their purchase price by ensuring that the money has been paid to a stakeholder account and only to be released to the seller upon proper transfer and upon the listing of the Energro shares. It is trite that when a plaintiff mounts a claim in negligence the court will like to ensure that the plaintiff himself was not negligent and had taken reasonable steps to avoid the incident. This jurisprudence has been expressed in various forms and captions such as contributory negligence, break in causation etc; In essence court will not indemnify the plaintiffs for its own negligence or carelessness. The learned authors of Ramaswamy Iyer's *"The Law of Torts"* 10th edn, Lexis Nexis, Butterworth make the following observations:

Plaintiff Being A Wrongdoer

> This circumstance is not by itself a defence, but may be material for other defences recognized by law. It may be evidence of the plaintiffs' consent or contributory negligence. It may show the absence of a breach of duty eg, where a trespasser is hurt by a vicious dog in the premises, or own negligence or carelessness. It may affect the causal relation between the defendant's breach of duty and the damage suffered by the plaintiff as in *Weld-Blundell*'s case and *Howard v. Odhams Press Ltd.* In the former case, Lord Dunedin suggested an alternative ground of decision *viz,* that no man can claim damages when the root of the damage which he claims is his own wrong.

(b) I have also dealt with the above area of law to some extent in the case of *Voon Jan Choo v. Lee Chie Siang & Anor*. [2007] 9 CLJ 242 where at p. 248, I had on the facts of the case made the following observations:

> (i) In the circumstances aforesaid, I take the view that the appellant should not have crossed the said road at the material time. A prudent thing for her to do would have been to wait for the traffic to clear. The appellant should not have just simply assumed that it would still be safe for her to cross the road at the material time and create a dangerous situation for her by having to stand in the middle of the road, waiting for the said lorry to pass to pass before she could continue crossing.
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> (i) The appellant in her evidence admitted that she was not sure of any vehicle following behind the lorry as her view was blocked by the said lorry.
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> (ii) I take the view that it was so imprudent and careless of the appellant in this case, to still proceed to cross the said road despite the fact that she was well were of the high risk, uncertainty and danger involved.
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> (iii) Alternatively, the appellant should have used the zebra crossing (controlled by traffic lights) in front of the Holiday Inn to cross to Tun Jugah at the material time. Her reason that it was of the zebra crossing in front of Holiday Inn from the place where the appellant was crossing is only about 20-30m. In any event, one should not have compromised his/her life with such a very trivial thing ie 'out of convenient' as what the appellant did in this case.

(c) In crude terms court will not allow a plaintiff who had rushed into a middle of a busy expressway and complain that the defendant driver who had knocked him down was negligent, notwithstanding the defendant has not pleaded contributory negligence etc because the defendant by no stretch of imagination can be said to be negligent. There is a duty first imposed on the plaintiff to take reasonable precaution to safe guard his own interest before complaining others were negligent. This part of jurisprudence had not been whittled down even after the coming into the scene of the case of *Donoghue v. Stevenson* [1932] AC 562. In the instant case, it was clear from the evidence the plaintiffs will not have suffered any loss if money was paid into stakeholders account

knowing for sure that there are many risks involved in restructuring exercise which must be seen like a busy expressway in respect of fortune or investment and many can be knocked down if they are not vigilant nothwithstanding there are a number of regulatory safeguards to protect the investing public.

(d) In addition, it is common knowledge in all transactions relating to property or shares where substantial sum is involved and also where there is an additional requirement of consent or approval required from relevant authorities it is prudent and/or expected of the purchaser to deposit the purchase price and/or balance purchase price in stakeholders account. From the evidence, it is clear that the 2nd and 3rd plaintiffs had in fact placed the purchase price in a "special account" but specifically authorised monies to be released to the 1st defendant on their own volition when there was admission in the evidence of the plaintiffs that there was risk involved in listing. The plaintiffs did not take any prudent measures to protect their own investment.

(e) It is my finding that although the 2nd defendant is under a duty to take care, they had observed the general requisite standard in the particular case and to their misfortune Kenneth Chow has stood as villain to defeat the listing process (see *Woods v. Duncan* [1946] AC 4001). In addition, the defendants' submission in opposing the plaintiffs' submission in respect of statutory breach, negligence, etc has merits.

[14] For reasons stated above, I dismiss the plaintiffs' action with costs. The getting up fees shall not exceed RM100,000. If costs cannot be agreed, the 2nd defendant is at liberty to tax the costs.

I hereby order so.